

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of	)	
	)	
Rules and Regulations Implementing the	)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991	)	
	)	
Broadnet Teleservices LLC	)	
Petition for Declaratory Ruling	)	
	)	
National Employment Network Association	)	
Petition for Declaratory Ruling	)	
	)	
RTI International	)	
Petition for Declaratory Ruling	)	

**Reply Comments in Favor of a Stay**

**Filed by**

**National Consumer Law Center  
(on behalf of its low-income clients)**

**Introduction**

Pursuant to 47 U.S.C. § 405 and 47 C.F.R. § 1.106, the National Consumer Law Center (NCLC)<sup>1</sup> files this reply supporting our request for a stay of the Federal Communications Commission's (Commission) declaratory ruling [hereinafter Broadnet Ruling] in the above-named proceeding released July 5, 2016.<sup>2</sup> These reply comments are filed on behalf of our low-income clients, and in furtherance of the positions taken in our Petition for Reconsideration of Declaratory Ruling and Request for Stay Pending Reconsideration [hereinafter Petition for Reconsideration] on

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<sup>1</sup> The National Consumer Law Center (NCLC) is a nonprofit corporation founded in 1969 to assist legal services, consumer law attorneys, consumer advocates and public policy makers in using the powerful and complex tools of consumer law for just and fair treatment for all in the economic marketplace.

<sup>2</sup> In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Petitions for Declaratory Ruling by Broadnet Teleservices LLC, National Employment Network Association, RTI International, CG Docket No. 02-278, Declaratory Ruling, FCC 16-72, (Rel. July 5, 2016) [hereinafter Broadnet Ruling].

behalf of fifty legal aid programs, and national, state and local public interest organizations filed on July 26, 2016.<sup>3</sup> The stay should be granted pending reconsideration of the Broadnet Ruling.<sup>4</sup>

A request for a stay is to be evaluated based on four factors.<sup>5</sup> These factors are (1) the likelihood of success on the merits; (2) the threat of irreparable harm absent the grant of preliminary relief; (3) the degree of injury to other parties if relief is not granted; and (4) whether the issuance of the order will further the public interest. Each of these factors is present in this case.

### **Likelihood of Success on the Merits**

There is a good prospect that the Commission will reconsider the Broadnet Ruling because of the contradictions between that Ruling and the Budget Act Rules,<sup>6</sup> the Broadnet Ruling's misinterpretation of the U.S. Supreme Court case *Campbell-Ewald Co. v. Gomez*,<sup>7</sup> and the danger it presents of irreparable financial harm to low-income consumers and to the privacy of all cell phone users. The Commission has repeatedly illustrated its commitment to protecting privacy and reducing the economic impacts from unwanted robodialed calls to cell phones, most recently in the Budget Act Rules and in the 2015 Omnibus Order.<sup>8</sup> As maintaining the Broadnet Ruling, without change and limitation, would severely undermine the exact protections articulated in these recent rulings, we submit that there is a strong likelihood that the Commission will act to continue its emphatic protection of cell phone users from unwanted calls.

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<sup>3</sup> Petition of National Consumer Law Center et al. for Reconsideration of Declaratory Ruling and Request for Stay Pending Reconsideration, CG Docket No. 02-278 (filed July 26, 2016), *available at* <https://www.fcc.gov/ecfs/filing/10726059270343> [hereinafter Petition for Reconsideration].

<sup>4</sup> In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Petitions for Declaratory Ruling by Broadnet Teleservices LLC, National Employment Network Association, RTI International, CG Docket No. 02-278, Declaratory Ruling, FCC 16-72 (Rel. July 5, 2016).

<sup>5</sup> See *Virginia Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958).

<sup>6</sup> In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Report and Order, FCC 16-99 (Rel. Aug. 11, 2016) [hereinafter Budget Act Rules].

<sup>7</sup> 136 S. Ct. 663 (2016).

<sup>8</sup> In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Report and Order, 30 FCC Rcd. 7961, 8006-10, ¶¶ 85-92 (2015) [hereinafter 2015 TCPA Declaratory Ruling and Order].

The amendments made by the Budget Act<sup>9</sup> themselves illustrate that Congress intended for government contractors to be covered by the Telephone Consumer Protection Act (TCPA).<sup>10</sup> The first part of the amendment to the TCPA in section 301 of the Budget Act creates an exception from the requirement for robocalls<sup>11</sup> that are “made solely to collect a debt owed to or guaranteed by the United States.”<sup>12</sup> The only callers who would possibly be making calls to collect debts owed to or guaranteed by the United States are either the agencies of the government or its contractors. There would have been no need for the exception created by the Budget Act if these calls, made by government contractors, were not covered by the TCPA. The existence of this change to the TCPA, made only a few months before the Broadnet Ruling was issued, contradicts the Broadnet Ruling’s sweeping determination that the TCPA does not apply to government contractors.

While the Order for the Budget Act Rules carefully explains the basis on which the Commission can regulate some calls made by the government and its contractors, even in the face of the Broadnet Ruling (based on specific authority granted it in the new subsection (H) of 47 U.S.C. section 227(a)(2)(H)),<sup>13</sup> there is no explanation of this important contradiction. If the Broadnet Ruling is correct, then there would have been no reason for Congress to add the exception for the federal government and its agents to make robocalls to cell phones without consent. According to the Broadnet Ruling, these callers were not covered by the TCPA, and thus there was no limitation on these calls, whether made with or without consent. If Congress had sought only to *add* the

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<sup>9</sup> Bipartisan Budget Act of 2015, Pub. L. No. 114-74, 129 Stat. 584 [hereinafter Budget Act].

<sup>10</sup> 47 U.S.C. § 227.

<sup>11</sup> We are using the term “robocalls” to refer to calls made with either an automatic telephone dialing system (“autodialer”) or with a prerecorded or artificial voice, or with both. *See* (2015) [hereinafter 2015 TCPA Declaratory Ruling and Order at 7694, ¶ 1 n.1].

<sup>12</sup> Budget Act § 301(a)(1)(A) (amending 47 U.S.C. § 227(b)(1)(A)); *see also id.* at § 301(a)(1)(B) (amending 47 U.S.C. § 227(b)(1)(B) to read, in part, that artificial- or prerecorded-voice calls cannot be made to a residential telephone line without the consent of the called party unless the call is “made solely pursuant to the collection of a debt owed to or guaranteed by the United States”). The Commission has interpreted the TCPA to apply both to voice calls and to text messages. 2015 TCPA Declaratory Ruling and Order at 8016-17, ¶ 107.

<sup>13</sup> Budget Act Rules, § IV.

authority to the Commission to regulate the number and duration of these calls, it would have only needed to add the new subsection (H), providing this authority. But common rules of statutory construction require that all words in a statute must have real meaning.<sup>14</sup> And there is simply no meaning to be given to the new language providing an exception from the consent requirement if the Broadnet Ruling is correct. This issue is well-articulated in the Statements of both Commissioners Rosenworcel and Pai.<sup>15</sup>

Moreover, the Broadnet Ruling appears to have relied on a fundamental misunderstanding of the express language and the holding in the *Campbell-Ewald Co. v. Gomez* case.<sup>16</sup> There was no finding by the U.S. Supreme Court in that case that the government is not a person covered by the TCPA; there is only the recognition that the doctrine of sovereign immunity protects the government from a suit for damages for violating the TCPA. Likewise, there is no finding that contractors for the federal government enjoy “derivative immunity.” Quite the opposite, the Court said:

“[G]overnment contractors obtain certain immunity in connection with work which they do pursuant to their contractual undertakings with the United States.” *Brady v. Roosevelt S.S. Co.*, 317 U.S. 575, 583, 63 S.Ct. 425, 87 L.Ed. 471 (1943). That immunity, however, unlike the sovereign's, is not absolute. See *id.*, at 580–581, 63 S.Ct. 425. Campbell asserts “derivative sovereign immunity,” Brief for Petitioner 35, but can offer no authority for the notion that private persons performing Government work acquire the Government's embrative immunity. When a contractor violates both federal law and the Government's explicit instructions, as here alleged, no “derivative immunity” shields the contractor from suit by persons adversely affected by the violation.<sup>17</sup>

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<sup>14</sup> See *Potter v. United States*, 155 U.S. 438, 446 (1894) (the presence of statutory language “cannot be regarded as mere surplusage; it means something”).

<sup>15</sup> See Concurring Statement of Commissioner Jessica Rosenworcel, *Re: Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278 (Aug. 11, 2016); Dissenting Statement of Commissioner Ajit Pai, *Re: Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278 (Aug. 11, 2016).

<sup>16</sup> 136 S. Ct. 663 (2016).

<sup>17</sup> *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 672 (2016) (emphasis added).

The combination of the express wishes of Congress, as illustrated by the addition of language exempting calls made to collect government debt from the consent requirement in the TCPA, and the specific words and findings of the Supreme Court case upon which the Broadnet Ruling was premised, indicate that the Commission issued this ruling in error.

### **Irreparable Harm Absent the Grant of Preliminary Relief**

The Budget Act Rules will provide substantial protections to consumers from calls to collect debt owed to or guaranteed by the federal government (for example by limiting those calls to 3 per month, providing a right to stop the calls, as well as a required notice of this right, etc.). However, these rules have prospective effect only, and do not take effect until 60 days after they appear in the Federal Register.<sup>18</sup> It will be at least five or six months before these rules are effective.<sup>19</sup> This means that there are three categories of *immediate and irreparable* harm to consumers involved in leaving the Broadnet Ruling stand:

- 1) federal contractors collecting federal debt will believe that, during the interim period before the Budget Act Rules become effective, they are not required to abide by the constraints of the TCPA;
- 2) federal contractors making non-debt collection calls will also believe their calls to be unconstrained; and
- 3) pending litigation challenging past transgressions of the TCPA by federal contractors will be affected by arguments that the Broadnet Ruling has retroactive application.

Therefore, at this moment and until the Broadnet Ruling is either stayed or reconsidered, the combined effect of the Budget Act Rules and the Broadnet Ruling is that only the Broadnet Ruling

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<sup>18</sup> Budget Act Rules at ¶¶ 59, 60.

<sup>19</sup> Once OMB has the rules to review, the review can take as much as another 120 days. Adding the 60 days after the regulation appears in the Federal Register brings the likely period before the rules are fully effective to approximately 180 days. *See* Office of Information and Regulatory Affairs, Regulations and the Rulemaking Process: “**Q. How long can OIRA take to review a draft regulation? A.** The period for OIRA review is limited by Executive Order 12866 to 90 days. There is no minimum period for review. Under the Executive Order, the review period may be extended indefinitely by the head of the rulemaking agency; alternatively, the OMB Director may extend the review period on a one-time basis for no more than 30 days.” Available at <http://www.reginfo.gov/public/jsp/Utilities/faq.jsp>.

is applicable—possibly removing the protections of the TCPA to all calls by government contractors, including calls by debt collectors.<sup>20</sup>

**Federal Debt Collector Calls.** The Commission’s announcement of the Budget Act Rules correctly found substantial consumer protections necessary for these calls. It would be inconsistent with the basis for those Rules to leave consumers unprotected from exactly those harms intended to be avoided by those Rules. All of the reasons for the strong defenses against too many robocalls by debt collectors upon which the Budget Act Rules are based are applicable to the next six months. The Commission should not leave consumers unprotected from these debt collection calls during this period.

**Other Federal Contractor Calls.** Moreover, regardless of the effective date of the Budget Act Rules, the Broadnet Ruling is likely to lead all *other* government contractors making calls for the federal government, other than for debt collection, to believe themselves to be completely unlimited by the protections of the TCPA. The Broadnet Ruling possibly provides some limitations on these calls based on its requirement that the contractor actually be acting in an agency capacity for the federal government. However, as is evident from the Petition for Reconsideration filed by the Professional Services Council [hereinafter PSC Petition],<sup>21</sup> arguing that no relief was actually provided by Broadnet because all federal contracts eschew any agency relationship with the contractors, the extent to which this agency requirement provides real limits on the Broadnet Ruling is very unclear. If the PSC Petition is correct, then the Broadnet Ruling has no impact going forward, so a stay will prevent confusion and, at the same time, will cause no harm to callers. If the

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<sup>20</sup> If faced with these arguments in court, we will argue that the Broadnet Ruling is incorrect, in the process of being reconsidered, and should not be followed.

<sup>21</sup> Petition of Professional Services Council et al. for Reconsideration of Declaratory Ruling, CG Docket No. 02-278 (filed August 4, 2016).

PSC Petition is not correct, the meaning and the impact of the Broadnet Ruling is—at the least—uncertain, and a stay is all the more necessary to protect consumers.

**Pending Litigation.** We have already learned of cases in which government contractors, accused of gross past violations of the TCPA, are likely to argue that the Broadnet Ruling stands for the proposition that they should not be held liable for these violations. If courts allow these contractors to escape liability for past transgressions, this undermines the important enforcement mechanisms of the private right of action in the TCPA, and will leave many individuals, who received dozens, or sometimes hundreds, of unwanted calls, without redress. Some examples of the types of serious TCPA violations that could go unredressed, if the Broadnet Ruling were applied to pending cases, include:

- In a case brought by a client of the law firm of Greenwald Davidson Radbil PLLC of Boca Raton, Florida and Austin, Texas,<sup>22</sup> a large collector of federal student loan debt placed numerous autodialed phone calls to the client looking for another person, the debtor on the loan it was trying to collect. The client notified the collector on numerous occasions that his cellular telephone number did not belong to the debtor the collector was attempting to reach. Although the collector recorded the client's calls explaining that the calls were to a wrong number, and the collector said it marked the number as a "wrong number," the calls did not stop. Discovery revealed that this collector placed scores of calls to the cellular telephones of consumers throughout the country after dates on which it knew that the numbers called were the wrong number.
- A client of Burke Law Offices, LLC, Chicago, Illinois<sup>23</sup> received multiple wrong number calls from a well-known, national debt collector that obtained his number as a result of a skip-trace in relation to a debt purportedly owned or guaranteed by the federal government. The following prerecorded voice message was left on the client's phone:
  - [Other Person's Name], this is the [redacted]. We are calling to confirm that we have your correct address and phone number for our records. This information is necessary to properly service your account. Please return our call toll-free at 1-[redacted]. Our normal business hours are from 8 AM to 9 PM, Monday through Friday. If this is the wrong number, please return our call to update our records. Again, our number is 1-[redacted].

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<sup>22</sup> These facts are described more fully in Reply Comments filed by Aaron Radbil in this proceeding.

<sup>23</sup> These facts are described in the Comment filed by Burke Law Offices in this proceeding, *available at* <https://ecfsapi.fcc.gov/file/10812200009152/Broadnet%20Comment%20-%20Burke%20Law%20Offices,%20LLC.pdf>.

Even though this debt collector knew it didn't have the client's "prior express consent" to call his phone because it obtained the number through a third-party skip-trace, it made an automated call to this client's cell phone to figure out if it had obtained the correct phone number, thus putting the onus on the consumer to let it know if it called a wrong number.

- According to another consumer rights lawyer, Client Jane Doe (a pseudonym), a resident of a southern state, received hundreds of unconsented robocalls from a federal contractor for her defaulted student loan debts. Despite the fact that Doe repeatedly told the debt collector to stop calling her personal cell phone, the calls continued unabated and invaded Doe's privacy and interfered with her personal life.
  - After the contractor was sued in federal court, the debt collector has now threatened to invoke the supposed protections of the FCC's Broadnet Ruling, as well as argue that the Ruling has retroactive application to the beginning of time, in order to try and escape TCPA liability for these robocalls. Doe's attorneys expect soon to face motions to dismiss this case based upon the Broadnet Ruling.

### **Serious Injury to Consumers**

As we explained in our Petition for Reconsideration, tens of millions of consumers will receive these unwanted robocalls, from both debt collectors and other contractors of the federal government. There will also be no way for recipients to make these calls stop. Low-income consumers will find their precious store of minutes or limits on texts depleted by these unwanted and unstoppable calls. Even if "debt collection" calls are constrained—once effective—by the Budget Act rules, all of the calls made by government contractors will not be restrained.

### **Issuance of A Stay Will Further the Public Interest**

NCLC's request for a stay is made on behalf of its own low-income clients and fifty legal services programs, all representing low-income people, and national, state and local public interest organizations.<sup>24</sup> The reasons articulated throughout these comments illustrate the degree to which the public interest will be best protected by an immediate stay of the Broadnet Ruling.

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<sup>24</sup> Indeed, more organizations indicated a desire to add their name to the Petition. However, we believed that the number and breadth of organizations included would adequately convey the strong sentiment from consumers about the importance of our request.



Respectfully submitted,

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